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Abstract This paper considers the justifiability of criminalising anti-social behaviour through two-step prohibitions such as the Anti-Social Behaviour Order (ASBO). The UK government has recently proposed to abolish and replace the ASBO; however, the proposed new orders would retain many of its most controversial features. The paper begins by criticising the definition of anti-social behaviour employed in both the current legislation and the new proposals. This definition is objectionable because it makes criminalisation contingent upon the irrational judgements of (putative) victims, and its often modest preventive benefits come at a high cost to citizens' liberty and autonomy. The paper then goes on to propose a new definition of anti-social behaviour that would meet these objections: that is, as a course of conduct that causes others to experience serious and justifiable anxiety about the safety of their local community. Whilst this definition identifies a serious form of wrongdoing, its precise scope is inevitably uncertain. The paper thus concludes that we have good reason to use two-step prohibitions such as the ASBO to regulate such conduct, so as to enable the use of the criminal law against it whilst minimising possible concerns of legality arising from the proposed definition's uncertain scope.

Introduction

The Anti-Social Behaviour Order (ASBO) is a British criminal justice measure which aims to prevent anti-social conduct – currently defined as behaviour that 'caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as [the actor]' (Crime and Disorder Act 1998, s. 1(1)). As a criminal prohibition, it is theoretically interesting because of its 'two-step' structure. Ostensibly, the ASBO is not a criminal penalty but a form of civil injunction. Anti-social behaviour, as defined above, is not a criminal offence:

rather, it is the conduct that qualifies one for an ASBO. If a court is satisfied, following either civil application proceedings or a criminal conviction, that a defendant has behaved anti-socially, then it may make an order containing any conditions 'necessary for the purpose of protecting persons... from further anti-social acts by the defendant' (ss. 1(4), 1(6)). However, ASBOs are unlike ordinary civil injunctions in that breach is a criminal offence, punishable by up to five years' imprisonment (s. 1(10)). The ASBO scheme thus effectively grants courts the power to create individualised, serious criminal offences, in order to prevent conduct that is not necessarily independently prohibited.[1]

In July 2010, the UK's new coalition government proposed to abolish and replace the ASBO. The order had been one of the previous Labour administration's flagship criminal policy measures. According to the new Home Secretary, though, the ASBO had become 'a conveyor belt to serious crime and prison', which had failed to act 'as a serious deterrent' where needed. As such, she pledged to replace it with new sanctions that would be 'easier to obtain and to enforce' but also, if possible, 'rehabilitating and restorative' (May 2010). These latter words, at least, would have been welcomed by many within the criminal law academy. The ASBO had been widely criticised within this sphere for its apparent ineffectiveness and questionable political motivations, but also for deeper reasons of moral and legal principle.[2]

The recent publication of the promised new proposals suggests, however, that earlier reports of the ASBO's demise were exaggerated. Whilst these proposals would see the term 'ASBO' removed from the statute books, two new measures would take its place that would retain many of its most distinctive and controversial features. First, Criminal Behaviour Orders would effectively replace ASBOs imposed following criminal proceedings. These would continue to target conduct that causes or is likely to cause harassment, alarm and distress to others, and would permit courts to ban individuals from certain activities or places, on pain of criminal conviction (Home Office 2011, pp. 14-15). Second, Crime Prevention Injunctions would replace ASBOs made in civil proceedings. Breach of these injunctions would be punished as contempt of court, rather than as a criminal offence; however, civil rules of

[1] Some behaviour that causes harassment, alarm or distress to others constitutes an offence under the Public Order Act 1986, s. 5. However, for the purposes of this offence, it must be shown that the defendant intended his behaviour to be, or was reckless as to his behaviour being, 'threatening, abusive or insulting': s. 6(4). The definition of anti-social behaviour, by contrast, has no such *mens rea* requirement.

[2] This paper concerns only these latter, principled criticisms. For an in-depth critique of anti-social behaviour legislation and policy from a socio-legal perspective, see Burney (2009).

evidence would govern application proceedings, whilst custodial sentences would remain available for breach. Additionally, the Home Office is contemplating extending the range of conduct in respect of which such an injunction could be imposed to cover conduct that causes or is likely to cause mere 'nuisance or annoyance' to other persons (ibid., pp. 16-18).

There are at least two reasons why these new proposals will disappoint those who have criticised the ASBO on principled grounds. The first is that they retain the ASBO's two-step format. The new proposals would eliminate one problematic aspect of this model: courts would no longer have the power to create individualised criminal offences as a result of civil proceedings. Nevertheless, the proposed injunctions would continue to permit severe restrictions of liberty and to threaten penalties that would be disproportionate to the relatively trivial wrongdoing that they aim to prevent. At least in the case of the Crime Prevention Injunction, they would also continue to offer only weak due process protections to defendants.[3]

Second, these proposals would retain the problematic definition of anti-social behaviour as conduct that causes harassment, alarm and distress to others – or, in the case of the Crime Prevention Injunction, would even contemplate extending this definition. This definition is problematic for obvious reasons: it catches an extremely wide range of conduct that goes far beyond the kinds of behaviour typically understood as 'anti-social' within public discourse. Arguably, though, there are even deeper problems with this definition as an object of state regulation. In particular, we might think that it identifies conduct that is not truly harmful but merely *offensive*, which should prompt us to be particularly cautious or sceptical about its employment in the criminal law.

In this paper, I will argue that a principled case can be made for criminalising some forms of anti-social behaviour through a two-step prohibition such as the ASBO. In doing so, I will not dispute much of the criticism just outlined: indeed, I will suggest that it may be decisive against both the ASBO in its current form and its proposed replacements. Rather, my aim is to identify the valuable ideals underlying such schemes, and to suggest how these might be given better expression in the legislation. I begin in part 1 by aiming to elucidate why the current statutory definition of anti-social behaviour is objectionable as a basis for a criminal

[3] Numerous prominent commentators have criticised the ASBO and other two-step orders on these or similar grounds: see e.g. Ashworth (2004), Ashworth & Zedner (2010), Gardner et al (1998), Simester & von Hirsch (2011) ch. 12, von Hirsch et al (1995).

prohibition. The problem, I suggest, is not necessarily that this definition is based on injury to psychological interests, rather than interests of other sorts. Rather, the problem is that negative feelings such as harassment, alarm and distress are belief-mediated, and hence can be based on unreasonable judgements. Additionally, the breadth of the current statutory definition is problematic. Whilst its preventive benefits will often be modest, its impact on citizens' autonomy is great, since almost anyone will from time to time be guilty of doing things which might harass, alarm or distress others.

I then go on, in the second part of the paper, to consider how we might re-define anti-social behaviour in order to meet these objections. I suggest that we should define anti-social behaviour as a course of conduct that causes others to experience serious and justifiable anxiety about the safety of their local community. This change would improve on the current definition in several ways. First, by drawing attention to the local context of anti-social behaviour and its cumulative impact on residents' quality of life, it would identify what is both distinctive and serious about the worst cases of such conduct. Second, it would strike a much more favourable balance than the current definition between the preventive goals of criminalisation and its impact on citizens' liberty and autonomy. Third, by limiting liability to those who have caused *justifiable* anxiety, it eliminates the possibility that the criminalisation of anti-social conduct will be made contingent upon irrational judgements.

In the final part of the paper, I turn to consider the legitimacy of two-step prohibitions. These are often thought to be problematic because they impose criminal liability for mere defiance: the behaviours that they prohibit may not otherwise be criminal. By contrast, I will argue that two-step prohibitions can be used as a way of clarifying pre-existing legal duties and granting actors some margin of error as to their scope. Whilst the definition of anti-social behaviour proposed in the previous section improves on the current definition in several important ways, its precise scope remains uncertain. Two-step prohibitions provide a way of using the criminal law to deal with such conduct whilst minimising the legality concerns that the definition's uncertainty would generate.

The Current Definition

Anti-social behaviour is currently defined as behaviour that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as the actor.

This definition is accompanied by a defence: courts must exclude from consideration behaviour that the actor can show is 'reasonable in the circumstances' (s. 1(5)). In this first section, I will argue that this definition is too broad. At the outset, we should remind ourselves of a potential complication: the range of conduct that can be criminalised by particular ASBOs is even wider than that falling within the statutory definition, as ASBOs can include any restriction deemed necessary to prevent the actor from engaging in further anti-social acts. For reasons that will become obvious in due course, though, I leave this complication aside for the moment. Instead I simply ask whether the conduct caught by the current definition can legitimately be criminalised.

How should we determine whether we may criminalise a given type of conduct? The theoretical literature on this issue is relatively small, but developing.[4] Broadly, a consensus has formed against thinking of criminalisation decisions in terms of a crude 'balancing' of reasons for and against. Rather, we should recognise that legitimate criminalisation has a number of distinct necessary conditions, which are only sufficient in combination (Schonsheck 1994). The precise form and content of these conditions is, unsurprisingly, not yet widely agreed upon. However, it has been suggested that we might structure our discussions by beginning with considerations of moral principle, before moving progressively towards pragmatic considerations arising from the law's institutional context (ibid.). A single paper clearly cannot hope to address adequately all such relevant concerns, particularly at the pragmatic end of the spectrum. An appropriately modest aim is therefore to highlight a range of conditions that is wide enough, if those conditions are satisfied, to yield a *prima facie* case for criminalisation.

At the purest level of moral principle, the most important and obvious constraint on the content of the criminal law is that, at least ideally, only wrongful conduct may be criminalised. We are only permitted to condemn those actors who have committed wrongs; thus, because criminal conviction and punishment have an inherently condemnatory, stigmatic aspect, they should only attach to wrongful conduct.[5] In assessing the legitimacy of the current definition of anti-social behaviour, it will therefore be helpful to enquire about

[4] For a survey, see Husak (2008) pp. 58-61. More recent entries include the various contributions to Duff et al (2010) and Simester & von Hirsch (2011).

[5] Husak argues that this constraint is also implied by the doctrines of the general part of the criminal law itself: (2008) pp. 72-76.

the moral status of the conduct within its scope. Given that anti-social behaviour is defined as behaviour that causes harassment, alarm or distress to others, its putative wrongness must presumably derive from its propensity to cause such negative feelings. We can thus begin by asking: does the fact that some action will or might cause harassment, alarm or distress to others generate a duty not to perform it?

Even if this question has a positive answer, the fact that the current statutory definition catches behaviour that is morally wrongful will clearly not be *sufficient* to vindicate it. A second widely agreed constraint on criminalisation is that the wrongdoing targeted by a criminal prohibition should also be the state's business: to use the familiar expression, it should be *publicly wrongful*.[6] There are several ways in which some kind of wrongdoing might fall outside the state's jurisdiction. One is that the interests set back by the relevant wrongdoing are not themselves within the state's jurisdiction: either because they do not represent shared values of the political community (Duff & Marshall 1998), or simply because the state is not responsible for protecting them (Lamond 2007). Here, then, is another way of challenging the current definition of anti-social behaviour. Even if it would be morally wrongful to cause harassment, alarm or distress to another, are these the kinds of effects from which *the state specifically* should protect us?

One device that is often employed in order to limit the scope of the state's jurisdiction in this way is the harm principle. Many versions of this principle exist, of varying strength. Roughly speaking, though, they all embody a commitment to a common idea: that the criminal law should primarily be a way of dealing with harmful wrongdoing. By implication, we should be sceptical or cautious about criminalising other kinds of wrongdoing that are not harmful.[7] This might be thought to cast doubt on the legitimacy of the current statutory definition of anti-social behaviour. As we have seen, this definition implies that the wrongness of anti-social behaviour consists in its propensity to cause negative feelings such as harassment, alarm and distress. On one popular view, such bad feelings do not constitute

[6] Some strict retributivists disagree, holding that moral wrongness alone provides the only principled constraint on, as well as the only valid positive reason for, criminalisation, and that the state is obliged to create institutions that aim to punish the morally deserving: see e.g. Moore (1997) chs 2-4.

[7] The seminal philosophical treatments of the harm principle are those of Mill (1859) and Feinberg (1984). There are well-documented problems with the harm principle as a way of constraining the scope of the criminal law, which I will not dwell on here: see Duff (2007) ch. 6.

harm but mere 'offence'.[8] If we subscribe to this view, as well as to the harm principle, then we should doubt that the state is permitted to criminalise conduct merely on the basis of its propensity to cause negative emotions.

Andrew Simester and Andreas von Hirsch hold this kind of view about the criminalisation of anti-social behaviour. According to their understanding of the harm principle, criminalisation is easiest to justify when the conduct to be criminalised leads – whether directly, indirectly or remotely – to harm to others. In their view, unwelcome mental states alone do not qualify as harms for the purposes of this principle. Rather, harm consists in setbacks to our interests: which is to say, in the 'diminution of our wherewithal, our means and capacities, for pursuing a good life and facing its challenges' (2011, p. 36). Negative feelings might sometimes lead to setbacks of this kind: most obviously, they might lead to psychological harms, such as trauma or the impaired ability to conduct everyday tasks. However, bad feelings alone are not harmful. As such, to criminalise conduct on the grounds that it harasses, alarms or distresses others does not satisfy the harm principle, as Simester and von Hirsch understand it. For them, the range of offensive conduct that may be criminalised is likely in practice to extend only to that which has harmful effects (ibid., ch. 7).

Nevertheless, Simester and von Hirsch do not wish to deny the logical possibility that 'merely' offensive conduct may properly be criminalised. The prevention of offence is, they believe, a valid goal of criminalisation; its pursuit must simply be subjected to certain mediating principles that do not apply to the criminalisation of harmful wrongdoing (ibid, ch. 8). The need for such principles arises (the argument goes) from the unique structure of offensive wrongdoing. Unlike harmful wrongs, offensive wrongs are not wrongs in virtue of their effects: since we have no general moral duty not to make others feel bad, the mere propensity to cause negative feelings cannot be a wrong-making feature. Rather, offensive conduct is wrongful – if and when it is – because of its disrespectful character. Properly understood, offensive conduct violates the conventions that regulate our social interactions. Whilst these conventions are not valuable in themselves, they are instrumentally valuable because, and to the extent that, they help to secure such things as the expression of respect, and the boundaries between our public and private lives (ibid., chs. 6.1-6.3).

[8] The word 'offence' in this context is usually understood to refer to negative mental states generally, rather than to its ordinary-language synonyms such as 'affront' and 'disgust': see Feinberg (1985) p. 1.

Are Simester and von Hirsch correct that the wrongness of so-called offensive conduct is never explicable in terms of its impact on others' feelings? We should doubt that they are. In many imaginable circumstances, it seems clear that we have a duty not to cause others to experience negative feelings – and, what is more, that we have such a duty precisely because our actions would have this result. For example, imagine that I am a pilot on a commercial flight carrying a large number of passengers. Motivated solely by my own amusement, I decide to fly in the direction of a tall building, pulling away from it only at the last second. This causes the passengers – and, presumably, the occupants of the building – to experience immense distress. Since I have no reason to do this besides amusing myself, it seems clear enough that I ought not to do it. It is also clear that the reason that I ought not to do it is that doing so will cause immense distress to a large number of people without adequate justification.[9] In this respect, negative feelings are relevantly like physical pains and other unwelcome sensations. There are certainly cases in which we are justified in causing them, but the possibility that some action will cause them nevertheless provides a moral reason against performing that action.

Of course, there are other respects in which negative feelings differ materially from physical pains. Most obviously, we exercise a degree of control over our mental states that we do not typically exercise over sensations of other kinds. In particular – and as is often noted in this context – feelings like harassment, alarm and distress are sometimes 'belief-mediated'.[10] A feeling is belief-mediated to the extent that it is caused by the formation of some belief about the world. For instance, I might feel alarmed by your presence because I believe that you pose a threat to me. This unique feature of feelings is plausibly important to discussions of criminalisation. Since we exercise a degree of control over our beliefs, we also have a degree of control over whether or not we suffer belief-mediated negative feelings. One might therefore think that we are to an extent morally responsible for the occurrence of such feelings, even when they are prompted by the actions of others.

Once again, though, it is difficult to believe that we do not have duties to cause belief-mediated negative feelings *simply* because we exercise some degree of control over them. The distress experienced by the passengers on my plane is doubtless mediated by the belief

[9] For clarity's sake, assume that my abilities as a pilot are such that I would not physically endanger the passengers by performing this manoeuvre.
[10] In particular, see Thomson (1990) ch. 10.3.

(over which they have some control) that my conduct endangers them; nevertheless, that conduct is surely wrongful.[11] Rather, the uniquely problematic aspect of belief-mediation does not become apparent until we consider cases in which the relevant beliefs are *unreasonable*. It is cases of this sort that cast the greatest doubt on the idea that the mere propensity to cause negative feelings could be sufficient to ground a criminal prohibition.[12] Under the current definition of anti-social behaviour, one's criminal liability is made contingent upon the unreasonable judgements of others. To illustrate this, consider the following case:

> *Loitering Teenagers*: A group of teenagers has taken to loitering on a housing estate at night time. Local residents are alarmed by the group's presence, believing that they pose a threat. This belief, however, is irrational: the group has given residents no reason to believe that they pose a threat of any kind.

The teenagers in this case have caused alarm to the residents. Thus, unless they can show that their conduct was 'reasonable in the circumstances', they will be caught by the definition of anti-social behaviour and therefore liable to an ASBO. For the purposes of this judgement, it matters not that the residents' alarm was mediated by irrational beliefs. This immediately seems objectionable – but why?

The answer lies partly in the fact that the putative victims in such cases can control their negative feelings – but only partly. The current definition of anti-social behaviour is problematic not only because it makes actors' criminal liability contingent upon the judgements of others, but because it does so unfairly. The imposition of general duties to avoid negative effects, whether moral or legal, inevitably impacts upon actors' autonomy: it impairs their ability to pursue valuable options. Such autonomy violations are particularly egregious, however, when the duties at issue are duties to avoid bringing about consequences that other agents are, normatively speaking, better placed to avert. This is the problem with imposing duties to avoid causing just any belief-mediated negative feeling. If we oblige the

[11] For further defence of the view that belief-mediation alone cannot explain why we ought not to treat negative feelings as we treat other kinds of harm, see Tadros (2011) pp. 39-42.

[12] Compare Feinberg (1985), who believed that the reasonableness of feelings should play no role in criminalisation decisions. Critics of Feinberg in this regard include Duff & Marshall (2006) and Simester and von Hirsch (2011).

teenagers in the above case not to loiter, then we restrict their autonomy in order to avert alarm to the residents, despite the fact that the residents could also avert this alarm simply by making the judgements about the situation that we could reasonably expect them to make. The teenagers can properly object to this, even though the propensity of their conduct to cause alarm remains a valid reason for them not to engage in it.

At this point, one might interject that the current statutory scheme governing anti-social behaviour allows the teenagers to make such an objection. As we have seen, conduct is to be disregarded in ASBO application proceedings if the defendant can show that it is reasonable in the circumstances. Might not the teenagers be able to demonstrate this if they can show that the residents' responses to their behaviour were unreasonable, and that to prohibit them from loitering would thus unduly restrict their autonomy?

It is not a foregone conclusion that such a demonstration would be regarded as showing that the teenagers' conduct was reasonable. However, even if such a defence were possible, the statutory definition would remain problematic. Whilst the potential causation of belief-mediated negative feelings provides a moral reason against action, it is not typically sufficient to make that action wrongful. This conclusion also depends on whether it is fair to demand that the actor potentially forego valuable options in order to protect the feelings of others – which in turn depends, *inter alia*, on the reasonableness of the beliefs underlying those feelings. This is the grain of truth at the heart of Simester and von Hirsch's view that we have no general duty not to cause negative feelings. Since the reasonableness of those feelings is also typically at issue, simply to cause such feelings is not a presumptive wrong of the kind for which the state may call us to account. As such, prohibitions on causing negative feelings should include the reasonableness of those feelings in the definition of the conduct that the state must prove – and not simply as an issue to be raised by the defendant.[13]

All of this leads to the conclusion that the current statutory definition of anti-social behaviour targets non-wrongful conduct. This objection does not stem from the definition's concern with the causation of negative feelings, as opposed to unwelcome effects of other sorts. Rather, it stems from the definition's failure to account for the fact that feelings are sometimes belief-mediated, and that they can therefore arise from unreasonable beliefs. As we have already seen, though, this is not the only ground on which we might object to the

[13] On the idea of criminal offences as presumptive wrongs for which the state may call us to answer, see Duff (2007) ch. 9.

current definition. Even if we were to conclude that the definition catches wrongful conduct, we might still argue that the state ought not to concern itself with protecting us from effects like harassment, alarm and distress. Is this so?

In answering this question, we must consider the compatibility of such preventive goals with the preservation of other important values, such as liberty and autonomy.[14] As we will see below, anti-social behaviour is capable of causing severe harms. However, isolated instances of harassment, alarm and distress do not count amongst these. Such negative feelings are often fleeting and trivial: we encounter them frequently in everyday life and deal with them easily. By contrast, the current statutory definition greatly damages citizens' autonomy. Under it, we are no longer totally free to do many of the trivial things that might cause others to experience harassment, alarm or distress: as we have seen, even the exception for conduct that is reasonable in the circumstances functions only as a defence. Additionally, the current definition includes no culpability requirement, meaning that liability for anti-social behaviour is effectively strict. Taken together, these facts make it difficult for us to act in ways that we can be certain will avoid liability to an ASBO.

These problems are further exacerbated when we consider the possibility of the non-ideal application of the current definition.[15] The current definition is so wide that anyone might conceivably be caught by it: few if any of us could claim never to have acted in a way that harassed, alarmed or distressed another, even in the recent past. Such breadth in criminal prohibitions is always a cause for concern, for it grants enforcement agencies almost total discretion as to who becomes criminally liable. In turn, there is a risk that enforcement will become inconsistent and unpredictable or (worse) discriminatory (Husak 2008, ch. 1.II). Experience in the anti-social behaviour context justifies these fears. There are several notorious examples of ASBOs falling far outside the originally stated purpose of the legislation, which instead seem to be ways of controlling behaviour perceived to be undesirable or troublesome. For example, ASBOs have prohibited (amongst other things) making sarcastic remarks, jumping into canals or rivers and allowing pigs and geese to escape from one's land (Macdonald 2006, pp. 195-203).

[14] For further analysis of the role of the balance between liberty and security in criminalisation decisions, see Tadros (2008).

[15] On the importance of analysing the non-ideal effects of a prohibition in criminalisation decisions, see Schonsheck (1994) pp. 70-79; Tadros (2008) pp. 949-951.

All of this suggests that the current statutory definition of anti-social behaviour does not target conduct that may legitimately be criminalised. Certainly, we should not be sceptical about the criminalisation of conduct that causes negative feelings simply because it targets setbacks to psychological interests, rather than interests of other kinds. However, such feelings are ruled out as a basis for criminalisation to the extent that they are based on unreasonable beliefs. Additionally, the current definition targets wrongdoing that is often very trivial at a great cost to citizens' autonomy. It also leaves an intolerably large scope for the operation of official discretion. We should therefore conclude that, even if the conduct within the scope of the current definition is sometimes morally wrongful, much of it lies outside the proper scope of the criminal law.

Redefining Anti-Social Behaviour

I turn now to consider how we might redefine anti-social behaviour in order to address the concerns just expressed. As I stated at the outset, I propose that anti-social behaviour should be defined as a course of conduct that causes others to experience serious and justifiable anxiety about the safety of their local community. This choice of wording probably appears somewhat arbitrary at first sight. As we will see, though, the focus on anxiety provides a way of explaining the pre-theoretical categorisation of a seemingly disparate range of behaviours as 'anti-social'. Additionally, the recognition of the cumulative impact of such behaviour on quality of life and the importance of local context is faithful to the stated motivations of the original proposals for the ASBO. Thus, the proposed change will hopefully command support as a way of avoiding the problems of the current definition.[16]

I should begin by outlining what I hope is an uncontroversial and common-sense account of the nature of anxiety. The experience of anxiety is primarily characterised by its psychological aspects, particularly feelings of unease and apprehension; however, it also typically involves physical feelings of nervousness. These feelings can be strongly unpleasant, even in isolated cases. If they persist for long enough, then subjects can feel physically exhausted, and find it difficult to concentrate on other aspects of their lives. In these respects, feelings of anxiety are materially similar to the 'fight-or-flight' response that characterises

[16] For an alternative kind of approach, which aims to rationalise anti-social behaviour legislation and policy in its current form, see Ramsay (2004; 2008).

fear. They are also similar to fear in terms of their causes: they are always related, more or less directly, to the perception of potential threats.[17]

Indeed, on this view, fear is perhaps best thought of as a type of anxiety, distinguishable by its relationship to a conscious perception of a more or less concrete threat. Because fears are generated by conscious perception, a fearful person can always readily provide an explanation (whether rational or otherwise) of why they are afraid. By contrast, other forms of anxiety may be caused by a perception of the mere abstract possibility of a threat, or by perceptions of threats that are unconscious. Thus, anxious people will often have to reflect on their condition in order to explain it. This is true, for example, of many people who experience social anxiety. It may ultimately be possible for me to explain why (say) I feel anxious about meeting new people: perhaps I am concerned that I might not be able to control their first impressions of me, that they might not like or respect me, that we might not get on well and so forth. However, I would probably only arrive at such an explanation after actively interrogating my own unconscious motivations.

To further illustrate this, consider another familiar form of anxiety that is not prompted by particular threats: anxiety arising from a perceived lack of control. If we search deep enough for an explanation of such anxiety, then we will probably conclude that if we lack control over some sphere of our lives, then we will be unable to deal with any threats that might arise within it in the future. This type of anxiety is characteristic of anti-social behaviour cases. An unwelcome person who invades some private space of yours, such as your home or neighbourhood, may well cause you to feel anxious.[18] This is because their presence will cause you to feel that you lack control over that space. These effects will be particularly pronounced in the contexts of our home and private lives, since these are the spheres over which we typically expect to have the greatest degree of control. Interference in these contexts tends to make us feel nervous and uneasy even in the absence of particular, consciously perceived threats.[19]

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[17] I use 'threat' here in its broadest sense, to refer to the possibility of any unwelcome state of affairs.

[18] For example, many of the most serious cases of anti-social behaviour involve 'nuisance neighbours'. Whilst such cases are comparatively rare, they are much more likely than cases of other kinds to have a high impact on the quality of the lives of their victims: see Millie (2009) pp. 23-25. The explanation for this is, presumably, that such behaviour is more likely to inhibit victims' peaceful enjoyment of their home lives.

[19] This insight – that wellbeing is significantly related to the extent to which some spheres of our lives are accessible to others – is sometimes thought to be the foundation of a right to privacy: see e.g. Gavison (1980).

These brief remarks suggest that anxiety can have a range of different causes, despite the underlying connection to at least a potential threat. It is therefore unsurprising that a wide range of conduct can also cause us to feel anxious. The disparate nature of the concept of anti-social behaviour reflects this. Confusingly, the sorts of behaviour that we collectively refer to as anti-social are often independently wrongful, quite apart from their propensity to cause anxiety. Indeed, they may even be independently worthy of criminalisation. For instance, consider such familiar forms of anti-social behaviour as vandalism, noise nuisances and persistent harassment. These are all examples of pre-existing criminal behaviours whose wrongness need not be explained in terms of their propensity to cause anxiety amongst the local communities in which they take place.[20] However, they may also have this additional psychological impact, which gives us a distinct reason to criminalise them as part of a course of anti-social conduct.

Another noteworthy feature of the impact of anti-social behaviour is that it is typically cumulative. The psychological impact of individual tokens of the kinds of conduct just considered will often be trivial, perhaps being limited to temporary and non-severe responses like harassment, alarm and distress. Nobody is likely, for instance, to become a nervous wreck at the sight of a single piece of graffiti, or at a single rave that goes on past midnight. Even threats or harassment from strangers in the street are often easily and quickly forgotten if it becomes clear that the perpetrators have no actual intention to cause harm. Rather, residents' anxieties about anti-social behaviour in their neighbourhood will often only make sense once we appreciate the persistent nature of that behaviour. We must therefore focus on entire courses of such conduct if we wish to form an adequate understanding of our reasons to criminalise it.

On those occasions when anti-social behaviour does have such a cumulative effect, its impact on quality of life can be devastating. This is because the exhausting and depressing effects of general long-term anxiety are amplified by the local context of anti-social behaviour. A reliable cure for many fears and anxieties is to alter one's conduct in order to avoid the relevant threat; indeed, this is the response to which we are naturally inclined. This avoidance strategy is not available, though, when the source of the relevant threat is within

[20] Typologies of anti-social behaviour have evolved in a way that reflects this. Most now include such categories as misuse of public space and 'environmental' damage alongside the previously familiar categories of neighbour disputes and direct intimidation: see e.g. Donoghue (2010) pp. 18-23; Millie (2009) pp. 11-13.

the community in which one lives. In these cases, one will be practically unable to escape the threat, and thus also the relevant anxiety – which in turn will also tend to make one feel more anxious. Because of this inescapable quality, the psychological impact of the worst cases of anti-social behaviour can also be self-generating.

The most serious cases of anti-social behaviour are those that have this characteristic cumulative impact on quality of life within local communities. The local context both explains the gravity of these cases and distinguishes them from other kinds of conduct whose criminalisation may be thought to be grounded in their anxiety-causing effects: for example, harassment.[21] These are also the same features that motivated the original proposals for the ASBO. It was felt that, even though some individual instances of anti-social behaviour were caught by existing criminal offences, this was not sufficient to protect residents of local communities from the cumulative psychological effects of such behaviour (Labour Party 1995). This rationale has rarely been addressed in academic discussion of the criminalisation of anti-social conduct, which has tended to focus (as we saw above) on the propensity of such conduct to cause offence. Perhaps this is due to a perception that the regulation of anti-social behaviour is, as a matter of political reality, primarily a way of enforcing conventional social norms. I make no comment here on whether such a perception is justified; in any event, it is worth emphasising that the harmful character of the most serious cases of anti-social behaviour is nevertheless both real and severe.

All of this suggests that defining anti-social behaviour in terms of its psychological impact on local communities improves on the current definition by catching only those cases that are most serious and that are closest to those that formed the original rationale for the ASBO. Next, we must ask whether this definition solves any of the problems with the current definition identified in part 1 above. First, let us consider the question of the reason-responsiveness of feelings. As we saw, it is plausibly an objection to the current definition of anti-social behaviour that it makes criminalisation contingent upon putative victims' irrational judgements. Since the proposed definition also concerns the propensity of conduct to cause negative feelings, how can it meet this objection?

The answer lies in the limitation of liability to those who have caused *justifiable* anxiety. The sense of justifiability implicated in this definition is special, for it refers not to the

[21] See Protection from Harassment Act 1997 ss 1, 2 and 4.

reasonableness of the feelings themselves, but to the reasonableness of the judgements underlying those feelings. As we have seen, 'anxiety' refers to the unpleasant psychological and physiological effects that result from perceptions of threats; thus, anxiety *per se* is neither reasonable nor unreasonable. Rather, to require that feelings of anxiety be justifiable is to require that we rule out precisely those feelings that were found to be problematic above: namely, those feelings that are caused by irrational judgements.

Anxiety is obviously justifiable in this sense to the extent that it is based on *rational* judgement. For example, because of the local context of anti-social behaviour, residents will often have knowledge of the perpetrators' previous conduct that will provide a reasonable basis for a judgement that a threat exists. Even when the perpetrators are otherwise unknown to their victims, it may still be rational for those victims to feel threatened. For instance, campaigns of insults and hate-speech provide direct evidence of disrespect for one's interests. Other forms of harassment can evidence such disrespect even when they are not explicit threats, because of how they are conventionally understood: aggressive shouting by a stranger would usually be understood to be intimidating, whatever its substantive content (Simester & von Hirsch 2002, pp. 277-278). Alternatively, one may properly infer a more general disrespect for one's interests from other kinds of wrongdoing. An obvious example in the anti-social behaviour context is vandalism: extensive damage to a community's physical environment can reasonably contribute to a perception that the community's interests more generally will not be accorded sufficient importance in the future.[22]

The scope of 'justifiable' anxiety may be wider than this, though. As we have seen, not all anxiety can be explained in terms of conscious, reason-responsive judgements about threats. Certainly, many fears will evaporate if we realise that our perception of the threat concerned was mistaken. However, those forms of anxiety that are prompted by unconscious perceptions of threats often do not respond to reason. Again, the example of social anxiety illustrates this. Say that I am able to identify the unconscious source of this anxiety on reflection: for example, that the new people I meet will not respect me. At a theoretical level,

[22] In this respect, I concur with James Q Wilson and George Kelling's 'broken windows' theory of neighbourhood disorder: see Wilson & Kelling (1982). The UK experience seems to support this claim: perceptions of anti-social behaviour are higher in those neighbourhoods with high levels of 'physical disorder' (Flatley et al 2010, p. 117). However, this claim should be distinguished from Wilson and Kelling's more controversial hypothesis that the prevalence of these kinds of behaviour in a given neighbourhood *in fact* tends to lead to more serious crime occurring there. Contemporary criminology is generally against this idea: see Burney (2009, pp. 24-28) for a summary of the relevant literature.

I might completely reject the idea that I should be concerned with such a possibility. Indeed, I might positively resent the fact that I feel anxious for such an inadequate reason. This might not do anything, though, to stop me from actually feeling anxious. Despite my best efforts, I may not be able to make my feelings conform to my rational judgements.

Anxiety is therefore a problem case for those who wish to rule out unreasonable feelings as grounds for criminalisation, since it is unclear whether it is truly belief-mediated (Thomson 1990, p. 250). On the one hand, anxiety always seems to be causally connected at least to a perceived possibility of a threat, even if that perception is unconscious. On the other, feelings of anxiety themselves often seem to arise in pre-rational ways. Precisely how we should respond to such a complex mental phenomenon will depend on our reasons for excluding feelings based on unreasonable beliefs as grounds of criminalisation. I suggested above that it is unfair to oblige actors not to cause others to experience such feelings, because those others can avoid those feelings simply by making the judgements about their situation that we can reasonably expect them to make. If this is correct, then we ought to admit the causation of pre-rational anxiety as a potentially legitimate ground of criminalisation. To the extent that agents cannot control their feelings, it is generally fair to expect others to make at least some effort not to cause them to feel anxious.

I will not attempt to settle this issue here. It will suffice for the moment to note that, in any event, the proposed definition would rule out the criminalisation of conduct on the grounds of its propensity to cause unreasonable anxiety, *at least* to the extent that such anxiety is truly belief-mediated. Finally, let us consider whether the proposed definition also improves on the current definition's balance between its preventive goals and the preservation of liberty and autonomy. As we saw, harassment, alarm and distress often represent only trivial and fleeting setbacks to our psychological interests, compared to the great losses to autonomy that preventing them can cause. By contrast, if we were to define anti-social behaviour in terms of its propensity to cause serious anxiety amongst local communities, then we would target only the gravest wrongs associated with such conduct. In turn, the role of official discretion in enforcing such a prohibition would be greatly diminished, for far fewer people would fall within its scope.

The damage to citizens' autonomy threatened by anti-social behaviour legislation would also be minimised under this definition. Whereas a prohibition against causing harassment, alarm and distress is very difficult to avoid, it is very easy to avoid causing the

kind of serious anxiety contemplated in this section. This change would be reinforced by focussing explicitly on the cumulative effects of whole courses of behaviour. If ASBOs could only be imposed in virtue of an entire course of anti-social conduct, then it is difficult to imagine any situation in which one would have to forego some valuable activity in order to be certain of avoiding liability. Of course, this still leaves us with the problem that the current definition does not contain a culpability requirement. However, redefining anti-social behaviour would also give us a chance to correct this. For instance, it would be easy enough to specify that the relevant effects must be brought about intentionally or recklessly, if this were thought to be necessary.

Two-Step Prohibitions

These observations suggest that to redefine anti-social behaviour in the way that I have proposed would satisfy several important conditions of legitimate criminalisation. I have deliberately stopped short of concluding, though, that such conduct *ought* to be criminalised, all things considered. One reason to be wary of such conclusions is the existence of other means of regulation besides the criminal law. Because criminal conviction has such severe consequences for those who are subjected to it, it is often said that criminalisation should be a 'last resort' for dealing with wrongful conduct.[23] One possible meaning of this maxim is that we should only criminalise conduct if we have decisive reason to prefer criminalisation to other kinds of legal regulation, or even to no regulation at all. In the anti-social behaviour context, we might want to consider purely civil injunctions, administrative regulation or even some kind of alternative dispute resolution before we pursue direct criminalisation (Duff & Marshall 2006, pp. 67-75).

Equally though, we sometimes have good reasons to *prefer* criminalisation to other forms of legal intervention. Such reasons certainly include the unique deterrent force of the criminal law: as we have seen, the most serious courses of anti-social conduct can have a profound negative impact on the lives of the communities in which they take place, which gives us a strong reason to seek to prevent them. However, we also saw above that such conduct can be seriously wrongful. Thus, the state has reason to *condemn* the worst anti-

[23] For an exploration of this idea, see Husak (2004).

social behaviour, as well as merely to deter it. Other methods of legal regulation lack the condemnatory force of criminal conviction and punishment. Thus, in deciding whether or not we should prefer criminalisation to these other types of regulation, we can legitimately include its condemnatory potential in its favour.[24]

In the space that remains, I will not attempt a comprehensive analysis of the relative merits of the various forms of intervention available to legislators for dealing with anti-social behaviour. This would, at any rate, require a great deal of further empirical work. Rather, I will focus on one particular feature of anti-social behaviour that might motivate arguments against criminalising it: that there can be *reasonable disagreement* about when it falls within the legitimate reach of the criminal law. I do not mean by this that there can be reasonable disagreement about the features of anti-social behaviour that make it wrongful, or that *might* make it apt for criminalisation. I have already said what I believe these features to be. Rather, I mean that there might be disagreement about whether particular instances of anti-social behaviour actually have these features.

We have already encountered some of the qualities of anti-social behaviour that make it susceptible to reasonable disagreement about when it falls within the legitimate scope of the criminal law. One is that individual instances of anti-social behaviour are often only trivially wrongful: only the cumulative impact of entire courses of such conduct can ground criminalisation. Given this, there may be reasonable disagreement as to how long a course of conduct must last or how severe its impact must become before it can be said to have impacted on the victims' quality of life to the required extent. For instance, for how long must a gang on an estate cause residents to feel threatened before their conduct may be criminalised? A year might seem sufficient and (say) a single weekend insufficient. However, we will probably have no definite answer for a precise term of days, weeks or months.

Another quality of anti-social behaviour that makes it particularly prone to such disagreement is that its significance is often contingent upon its social context. This is especially problematic if one is convinced that the propensity to cause unreasonable negative feelings is not a sound basis for criminalisation. If there can be disagreement about the significance of an action, then there may be disagreement about whether that action can form a reasonable basis for a perception of a threat, and thus for feelings of anxiety. For example,

[24] The idea that the wrongness of conduct provides a reason for, as well as a necessary condition of, criminalisation is a defining feature of what Duff calls 'positive' legal moralism: (2007) ch. 4.3.

we may be certain that racist insults or particularly severe invasions of personal space can properly be described as threatening when perpetrated by strangers. Likewise, we may be certain that mere loitering cannot be described as such. Opinions may differ, though, about particular cases of noise nuisance or vandalism. If we ought not to feel threatened by such conduct, then it ought not to count as part of a course of criminal behaviour.

This kind of ambiguity as to the legitimate reach of the criminal law presents a problem in legislating criminal prohibitions. Two familiar kinds of solution are available. One is to specify in concrete terms a certain kind of conduct that approximates the relevant wrong and to create a prohibition against this. Speed limits are a well-known example of this kind of solution: they prohibit a concrete kind of conduct (driving above a certain speed) that is approximately equivalent to dangerous driving (Duff 2007, ch. 7.3). This kind of solution is also suited to certain kinds of conduct that might contribute to a course of anti-social behaviour. In English law, for instance, there is a criminal prohibition against noise nuisances that exceed a specified 'permitted level' of volume.[25] This solution greatly reduces the potential for disagreement about the content of the law, even when such disagreement persists in the moral sphere.

However, such certainty comes at the price of poorly defining the relevant wrong. Concrete limits will tend to result in some people being wrongly condemned, whilst excluding from liability others whose actions are worthy of condemnation (ibid.). Additionally, they will not be practical for some forms of anti-social behaviour. Although it may be easy to specify in concrete terms when a loud noise should be deemed sufficiently severe to engage the criminal law, the same is not true of insults or threats. Given this, legislators have a good reason of principle to prefer a second kind of solution: holding people to abstract standards of conduct, with some discretion left to legal decision-makers as to when that standard is met. This is the solution adopted for so-called 'public nuisance' in English law, which is conduct that 'materially affects the comfort and convenience of life of a class of Her Majesty's subjects'.[26] Although such standards lack the certainty of specific limits, they are preferable

[25] Noise Act 1996 ss. 3-5; Permitted Level of Noise (England) Directions 2008.
[26] *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169,184.

in principle because they more accurately identify why such conduct might be worthy of criminalisation.[27]

We can now see how reasonable disagreement about the substantive content of criminal prohibitions might ground a principled appeal for keeping anti-social behaviour outside the criminal law, even given a strong *pro tanto* case for criminalising it. The precise limits of criminal offences based on abstract standards are inherently uncertain. This uncertainty is aggravated in the context of anti-social behaviour, given its cumulative and sometimes context-dependent nature. It is common ground that the rule of law requires legal rules to be clear, determinate and capable of being obeyed, especially in the criminal law, given the consequences that attach to criminal conviction.[28] However, even the revised definition of anti-social behaviour suggested above would likely fall foul of these criteria to some extent. Hence, even though we have good reason to criminalise some anti-social behaviour, the potential for reasonable disagreement about the scope of any measure prohibiting it gives us reason to refrain from doing so.

Nevertheless, we need not think that to refrain from criminalising anti-social behaviour simply means to ignore it. As we have seen, it might mean using other kinds of legal regulation than criminalisation. But it might also mean making only *qualified* use of the criminal law. As I emphasised above, we are not only permitted in principle to criminalise the most serious courses of anti-social behaviour, but we have *good reason* to criminalise them, because the state has good reason both to condemn and to deter effectively this kind of serious wrongdoing. The problem with this is that criminal prohibitions against such conduct, if they are to correctly describe the relevant wrong, are likely to be unacceptably vague. A solution is therefore required that allows us to criminalise the relevant behaviour, correctly identified, whilst eliminating or minimising the injustice associated with inherently uncertain legal rules.

This is where two-step prohibitions have a role to play. By using a two-step prohibition such as the ASBO, the state can make conduct potentially subject to criminal liability without directly criminalising it in uncertain terms. This is made possible by separating procedurally

[27] For further reflection on the relative merits of concrete 'rules' and abstract 'standards' in criminal law, see Schlag (1985); Alexander & Ferzan (2009, ch. 8).

[28] For theoretical treatments of these requirements of the rule of law, see Fuller (1969) ch. 2; Raz (1979) ch. 11. On the importance of such requirements to justice more generally conceived, see Finnis (1980) pp. 270-273.

the specification of the relevant standard of conduct and the creation of a criminal prohibition. The standard of conduct is specified at the first stage: that is, in the provisions governing the imposition of orders, which define the targeted wrong in an accurate and easily understandable but inevitably indeterminate way. An actual criminal offence, however, is not effectively created until the second stage: that is, in the imposition of an order, when the court warns the subject, in specific terms, about what future conduct of theirs will result in criminal liability.

This way of understanding two-step prohibitions acknowledges that guiding citizens' conduct is an important function of rules of criminal law. As we have already seen, this is not the only function of such rules: they also serve to guide *ex post* judgement and condemnation of citizens' conduct, which gives rise to the idea that only wrongful conduct may be criminalised. However, the conduct-guiding function of such rules is also important in their justification. This helps to explain why it is easier to justify criminalising anti-social behaviour only at the second stage of a two-step prohibition. Whilst courses of such conduct may be worthy of state condemnation even before an order is imposed, the legitimacy of condemnation is not the only factor that determines the legitimacy of criminalisation. We also have reason to ensure that criminal prohibitions provide adequate guidance to citizens; thus, we have reason to refrain from condemning culpable actors until their obligations can be specified in adequate detail.

This is not to suggest that just any kind or level of definitional uncertainty in general criminal prohibitions provides a conclusive argument in favour of the use of a two-step order. Anti-social behaviour is a special case in this regard: the belief-mediated and cumulative nature of its impact makes it particularly difficult to define in tolerably precise and concrete terms. Nevertheless, this line of argument does have general – and potentially radical – implications. The availability of two-step orders prevents us from having always to make a stark choice between the ends of criminalisation and the maintenance of the rule of law. Once we appreciate this, we might find that there are other kinds of conduct that would also be best regulated through ASBO-like schemes. Particularly when we only have strong reason to criminalise whole courses of a certain kind of behaviour, schemes of this kind enable us to do so whilst giving actors a fair chance to avoid criminal liability.

We can helpfully contrast this justification of two-step prohibitions with the view that they are unacceptable because they punish mere 'defiance' (Ashworth 2004, p. 288). Clearly

this would be a valid criticism if this were indeed the sole function of such prohibitions: the fact that conduct defies authority might sometimes make it wrongful, but it does not necessarily do so. On the view suggested here, though, ASBOs (sufficiently refined) would not simply be individualised *instructions* to their subjects that render disobedience punishable. Rather, they would be authoritative *determinations* of whether a given course of conduct is an instance of the prohibited wrong. Seen in this way, two-step prohibitions would not represent an individualised criminal law, imposing entirely new obligations on those who are subject to them. In their abstract form, the standards they impose would be generally applicable; individual orders simply clarify particular actors' obligations, and grant a margin of error as to their scope.

None of this is meant to deny that both the ASBO in its current form and its proposed replacements fail to live up to this ideal. As we noted at the outset, these effectively circumvent the traditional due process requirements of the criminal law. Additionally, the fact that they can include any restriction deemed necessary to prevent further instances of the targeted conduct means that they can impose disproportionately onerous burdens on those who are subject to them. Nevertheless, it is possible to imagine a regime of two-step orders that does not have these features. We might easily require that the procedural rules of the criminal law apply to the hearings at which orders are made (as would be the case for the proposed Criminal Behaviour Order), and that the orders prohibit only further instances of the targeted conduct itself. Indeed, these limitations would follow naturally on this view, given that the aim of two-step prohibitions would be to provide an indirect way of criminalising the conduct concerned.

Nevertheless, problems with the two-step model would remain even if it were revised as I have suggested. In particular, a great deal of power would remain vested in the courts that are charged with framing individual orders. Whilst it is preferable for these courts to make decisions about the interpretation of uncertain legal definitions than unaccountable enforcement agencies, they will still have a wide-ranging power over the freedom of those who may become subject to ASBOs. This is problematic because magistrates might be thought to lack both the appropriate training and the democratic accountability and legitimacy necessary to make what amount to important public policy decisions about the appropriate

balance between liberty, autonomy and security.[29] As such, it is important that any change in the structure of ASBOs and the definition of the conduct that they target should be accompanied by additional legislative guidance on their interpretation and application. The above discussion suggests several points that any such guidance should address.

First of all, any new legislation must clearly distinguish between the kind of serious anxiety that it would aim to target and the broader current definition of conduct that causes 'harassment, alarm and distress'. There are two dimensions to this: both the type of harm involved and its magnitude. As regards the type of harm, it should be made clear that ASBOs are not simply a way of controlling any behaviour that causes others to feel bad, or that others find morally offensive. They are specifically a way of controlling behaviour of the kind originally cited in support of them: that is, behaviour that causes people to feel unsafe within their own local communities. As regards the magnitude of the harm, it should be made clear that the harms targeted are persistent and severe. ASBOs should not be used where the harms suffered are only fleeting and trivial; agencies of the state should be able to demonstrate that the conduct concerned has had a significant detrimental impact on the quality of life of at least one person other than the actor.

A further restriction on the kind of conduct that any new legislation should target has been discussed at length above: that anxiety must be a justifiable response to it. Legislation should only prohibit conduct that causes unreasonable feelings, at least to the extent that those feelings are truly belief-mediated. To put this point in more readily understandable terms, it should be made clear that people are not to be held responsible for the poor judgements of others. For example, to the extent that it is really true that the loitering teenagers' conduct gives local residents no reason whatsoever to feel threatened, it should be clear that the residents' feelings are not eligible for protection through the criminal law.

Finally, it should be clear that the restrictions imposed by individual orders must extend no further than prohibiting future instances of the targeted conduct. As we have seen, this condition is a necessary consequence of conceiving of two-step orders as a means of indirect criminalisation. However, requiring courts to consider more carefully the relationship between the restrictions imposed by individual orders and the conduct that those orders seek prevent may also have an important instrumental function. One reason to prefer the

[29] For further development of this kind of criticism of two-step prohibitions, see Simester & von Hirsch (2011) pp. 219-220.

proposed new definition of anti-social behaviour to the current definition is that it strikes a more favourable balance between the preventive goals of the legislation and the autonomy of citizens. By requiring courts to ensure that they do not limit citizens' autonomy any more than is necessary, we also invite reflection on the preventive goals of particular orders. In practice, we could expect this to give defendants an extra layer of protection against the draconian use of such orders to prevent harms which are insufficiently severe to justify criminalisation.

Conclusions

In this paper, I hope to have shown that we have, in principle, a strong case for criminalising anti-social behaviour through a scheme of two-step prohibitions such as the ASBO. I argued that we should not be sceptical about criminalising such behaviour simply because it sets back psychological interests, rather than interests of other kinds. However, the current statutory definition of anti-social behaviour is nevertheless too broad, because it does not account for the belief-mediated nature of some feelings, and greatly reduces citizens' autonomy in the name of securing modest preventive benefits. In order to meet these objections, I proposed that we should redefine anti-social behaviour as a course of conduct that causes others to experience serious and justifiable anxiety about the safety of their local community. The precise scope of this definition, however, inevitably remains uncertain. I therefore concluded that we have reason to use two-step prohibitions to supplement this definition, since these provide a way of indirectly criminalising the targeted conduct whilst clarifying the nature and scope of actors' obligations.

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